THE EFFECTS OF THE TWICE-IN-JEOPARDY PRINCIPLE IN CRIMINAL TRIALS[1]

CHARLES C. NOTT, JR.

Assistant District Attorney, New York County

SOME months ago, during the strike of an express company's employes, a man who was passing through New York for the purpose of going on a shooting expedition was set upon as he passed along the street and was stabbed to death, having been mistaken for a "strike-breaker." Certain of the striking employes were arrested, and the case was brought to trial against the man against whom there was the strongest evidence. That evidence consisted in large part of a confession made by him to one of the assistant district attorneys of the county. On the occasion of the making of the confession a stenographer was present; the accused was warned of his rights, and was informed that whatever he said might be used against him, no threats nor promises being made to him. When the case came to trial the confession was offered in evidence, and the trial judge refused to receive it. The district attorney trying the case asked his reason and he said: "I do not think it is proper; I simply will not receive it." Though numerous cases directly in point were cited, the ruling stood, and the confession was ruled out. The remaining evidence against the defendant was not such as to warrant a conviction, and the jury acquitted—and it could not be blamed for it under the circumstances. That crime went absolutely unpunished.

How did that result arise? The judge who tried the case was a conscientious man, and did not intend to inflict an injury on the prosecution's case, but he did have the idea that even though he thought the confession admissible evidence, it lay in his discretion to say whether or not he would let it in. But why was that in his mind? Because of the doctrine that has come

[1] Read at the Conference on the Reform of the Criminal Law and Procedure, May 13, 1911.

down to us from centuries ago, which says that "no man shall be put twice in jeopardy for the same offense."

You may ask why that doctrine had anything to do with this ruling; or why the judge believed that he had the discretion to admit or reject this evidence? It came about in just this way: because a man cannot be put twice in jeopardy of life and limb, if he is acquitted he cannot be re-tried; and because after acquittal he cannot be re-tried, the people cannot take exception to any ruling made by the judge which is against the prosecution; nor can the people raise any question whatever on appeal. Therefore in going into a criminal trial the people are absolutely defenseless in the hands of the trial judge; no ruling made by him against the prosecution can in any way be revised.

By long continuance of this practise the idea has grown up in the minds of many judges that in the trial of a criminal case, the litigation is not simply a lawsuit, as between two parties litigant. In the trial of a civil suit, where one lawyer represents one party and another lawyer represents another, the minds of these judges would work perfectly fairly and judicially, and they would be far from prejudicing one party or the other by any ruling. But when it comes to criminal action, or prosecution, some seem to go to such lengths in safeguarding what are deemed to be all the rights of the defendant that the prosecution is seriously handicapped. They seem to have the idea that they may simply use their discretion as to admitting evidence against the prosecution which should not be admitted, and keeping out evidence in its favor which ought to be admitted.

If we consider the origin of the twice-in-jeopardy principle, we shall see that at the time it was enacted nothing could have been fairer and more reasonable; but it was never meant to apply to any such situation as the present one, in which the second-jeopardy theory prevents re-trial of a defendant, though his acquittal be reversed in proper manner on appeal.

The rule arose at a time when a defendant was under most extraordinary disabilities, when he ran a terrible risk in any trial for felony. It arose at a time when every felony was punishable by death; when there were no prisons in our present sense, but only prisons for detention for trial. It arose in an

age when a defendant was not entitled to the benefit of counsel, and no lawyer appeared for him. It arose in an age when he could not take the stand in his own behalf, no matter whether his whole case depended on his own evidence. It arose—and this is most important—at a time when neither side could appeal. All of these things being so, the justice of the rule is evident. When a man had gone through such an ordeal of death as that, common humanity required that he should not again be put in jeopardy. Yet further, as neither side could appeal, the law said to the prosecution, "If this man is acquitted, the law will not allow you to keep on trying him, over and over again, until you get a verdict that suits you." It was meant to prevent such oppression. As was well stated in an early case in this state, the object of the rule was to prevent juries from being discharged by the prosecuting officer from motives that were oppressive, or merely to give him a chance to repair mistakes.

Not only was the rule designed to prevent oppression, but it was designed to put both parties on an absolutely equal footing; and it is almost grotesque to see how it has now been changed to put the parties on an absolutely unequal footing. As neither side could appeal, it follows that if the defendant was convicted, there was no way in which he could obtain a new trial; he was promptly hanged. Consequently it was held that as the defendant could not get a new trial if convicted, he should not be tried again if acquitted; one litigation was to settle the whole question.

Observe the present change. Every one of the disabilities previously mentioned has been removed. The defendant is no longer, except in cases of murder in the first degree, punishable with death. He is entitled to counsel, and he is entitled to the names of the prosecution's witnesses; he is entitled to the evidence in the case against him, and he has the right to cross-examine the witnesses for the prosecution; while the prosecution is not entitled to know anything of the defense that the defendant intends to offer. He is also entitled to take the stand in his own behalf; and lastly, he has been given the right of appeal; while the people have not been given that right. When we realize that the second-jeopardy rule was designed to

put both parties on an equal footing, then, considering that this rule has been applied to prevent re-trial of a defendant after a reversal of a conviction only, the present situation appears extraordinary, to say the least. The result is that the people are without any remedy whatever, no matter what ruling be made during the trial, no matter what misconduct be indulged in by defendant's counsel. And to that fact, in a very large measure, do I attribute the ineffectiveness of many of our criminal trials.

This rule was incorporated into the constitution of the United States and of the state of New York; but at the time that it was incorporated into those two instruments, the defendant had no right of appeal, and I have no idea that the framers of those constitutions supposed that the rule would be invoked to prevent the people from taking an appeal if that right should be granted to the defendant. The defendant's right of appeal in this state was apparently established by the laws of 1801, which enacted that in a capital case it was to be granted by grace of the chancellor, and in other cases as matter of right.

As against the defendant's right of appeal, the state at the present time is without the power to appeal in any way, except in two contingencies, which merely raise questions of law, *viz.*, from a judgment sustaining a demurrer and from an order in arrest of judgment. If an indictment is dismissed, the state has no appeal. In a recent case a man pleaded guilty. Shortly after this plea was entered, the presiding judge, without consulting the district attorney, called the defendant to the bar, had his plea of guilty withdrawn and his plea of not guilty reinstated, and then dismissed the indictment against him, without giving any reason. The people were absolutely without remedy. If a verdict of guilty is returned in a case, the presiding judge has it in his absolute power to set it aside and order a new trial. No matter what his grounds are, no matter how strong the case of the people may have been, there is no remedy.

I shall next state three or four cases that illustrate the practical workings of this rule. I do this, disclaiming any improper motives as actuating any judge, but merely to illustrate the idea that some judges have, that they are to exercise absolute discretion, when it comes to the people's case, as to admitting or

rejecting evidence. These are not special cases; they have simply been noted as they came up in the day's work.

On one occasion the district attorney handed to the presiding judge certain requests to charge the jury. They were handed back with the remark that the district attorney had no right to make such requests and that the court would not receive them.

In a murder case, for the defense, specific acts of violence on the part of the deceased were allowed to be put in, instead of merely his reputation for violence. This reduced the verdict to manslaughter, although the deceased was shot in the back, while running away.

In the case of a man who was being tried for maintaining a pool room, after the jury went out the judge announced to the rest of the panel that his charge to the last jury was not the law, but was more favorable to the defendant than the law was; and that he had charged as he had because this case was the first to come up that term under the act.

In another case the defendant's attorney told the district attorney that at the close of the people's case he intended to have his client plead guilty, as he wished the case to go in against him for some reason. Before the people's case was half done, the judge directed a verdict of acquittal, although the code of criminal procedure provides that an acquittal can be directed only after either side has closed its evidence. The same thing was done in another case, brought by the Gerry Society, where a verdict was directed after one witness had been heard, and before the people had put in their case. On one occasion a judge announced that he should direct an acquittal in any case which depended upon the uncorroborated testimony of a police officer, no matter whether his credibility was impugned or not; he would let no such case go to the jury.

The following case well illustrates the mental attitude of some judges in failing to recognize that a criminal prosecution is a lawsuit in which both parties have equal rights under the law. Four Italians were jointly indicted for burglary, and two of them elected to go to trial together. The assistant district attorney asked the officer who made the arrest how he happened to be in that vicinity, it not being his regular post. The officer

replied that he was watching a building which had previously been blown up by a "black hand" bomb. Thereupon the court reprimanded the officer for making the answer, said it was improper and prejudicial to the defendants' rights, and directed their acquittal. The other two defendants were subsequently tried and convicted. The statute authorizing the court to direct an acquittal in a criminal case (section 410 of the code of criminal procedure) provides: "If at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction it may advise the jury to acquit the defendant, and they must follow the advice." In this case the acquittal was directed before the evidence on either side was closed, and there was no question whatever of the sufficiency of the evidence to convict. Now, even if it be assumed that the question and answer were improper, the court could have struck out the answer and charged the jury to disregard it; or the court could have withdrawn a juror, declared a mistrial and directed the case to be submitted to another jury. But the court did neither of those things; it directed a final judgment to be entered in favor of one litigant and against the other, in total disregard of the law.

The effect of the inability of the people to take an appeal is most unfortunate upon that part of the bar who appear for defendants in criminal cases. In a civil case it is to the interest of the attorney for either side to inject no improper evidence into the case and to exclude no proper evidence, so as to preserve a record which will be sustained on appeal. But in a criminal case, as the defendant's attorney knows that the people can take no appeal, it is to his advantage to exclude all the evidence favorable to the people, no matter how competent, and to get in evidence all testimony favorable to the defendant, no matter how incompetent, and to resort to any trick, subterfuge, or unprofessional display which will serve to facilitate an acquittal—the professional conduct of the defendant's attorney not being in review by any appellate court. This freedom from all restraint upon the defendant's attorney is also accountable for much of the ineffectiveness of our criminal trials and for those features which have tended to bring them into disrepute.

But one matter now remains to be discussed, and that is, what reasons can be advanced against giving the people the right of appeal for errors committed upon the trial. Apart from generalities against "any invasion of this palladium of our liberties" indulged in so often by those who fail to appreciate the original purpose of the second-jeopardy rule, only one argument has ever been advanced meriting serious consideration. The objection has been made that if the people could appeal, the poor defendant would be unable to respond to the appeal, which would necessarily go by default against him.

This is a matter, however, easily remedied. There would be no difficulty in the court's assigning to an impecunious defendant counsel to conduct his appeal. The expense to the defendant would be very small, as the necessary printing of the record has to be paid for by the appellant. The necessary disbursements which the defendant would have to incur would be paid for by the state.

Again, if it be objected that this would be a serious financial burden, the reply is obvious. If once the law were on the statute books granting the people a right of appeal, the trial of criminal cases would be so improved in tone that the right would have to be resorted to but seldom. District attorneys are human, and they receive no extra compensation for work on appeals, nor are they desirous of drawing upon their allotted funds uselessly. They would probably be more open to criticism for refusing to go to the labor and expense of taking an appeal where abstract justice demanded it than they would be for taking unnecessary appeals.

Should the right of appeal be granted to the people, the defendant would still be secure against those dangers which the rule against second jeopardy was intended to protect him from, *viz.*, oppressive action by the authorities and the possibility of a re-trial after an acquittal when he could not obtain a re-trial after a conviction. On the other hand, it would restore that state of equality to the two parties which the rule intended to establish, giving to both parties equal rights during the trial and equal rights to review, safeguarding the interests of both.